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Supreme Court
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Case No._____

IN THE
SUPREME COURT OF THE UNITED STATES

BEVERLY BETANCUR,
Petitioner,

vs.

STATE OF FLORIDA DEPARTMENT OF HEALTH,
et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal trademark law can preempt or abrogate the state law from interfering with, undermining the value of, and usurping the use of a registered certification mark in this case, the mark "Naturopathic National Council, Inc."® owned by a professional association, by improperly identifying the certification mark with a class of medical professionals that the professional association has not, and does not purport to regulate, and with respect to whom the certification mark was not intended to have application?

2. Whether the State of Florida's effort to regulate the practice of "traditional naturopathy" ultra vires statutes intended to regulate only "extended naturopathy" has violated the procedural due process rights of traditional naturopaths thereby interfering with the rights of qualified persons to employ the certification mark to identify themselves as licensed traditional naturopaths, a profession that arguably is not subject to Florida state licensing regulations?

3. Whether the State of Florida's effort to prohibit Petitioner from employing the certification mark to identify herself with the standards of the Naturopathic National Council, Inc.® improperly interfered with her rights under the certification mark to hold herself out as a licensed "traditional naturopath"?

4. Whether the State of Florida violated Petitioner's trademark rights by mis-identifying through licensing regulations, practitioners of extended naturopathy with the practice of traditional naturopathy, which is the only profession certified by the professional association—the Naturopathic National Council, Inc.[3]?

5. Whether the United States Patent and Trademark Office (USPTO) improperly denied the professional organization's application for registration of the certification mark "Doctor of Naturopathic Medicine" because the determination was principally based on an objection improperly interposed by the State of Florida, and erroneously considered by the USPTO in violation of applicable law?

LIST OF PARTIES

All parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

ANA M. VIAMONTE ROS, M.D.,
Florida's Secretary of the Department of Health in her official capacity and individual capacity, Respondent

BEVERLY BETANCUR, N.D.,™ Petitioner

M. RONY FRANÇOIS, M.D., M.S.P.H., PhD, Florida's Secretary of the Department of Health, in his official capacity and individual capacity, Respondent

STATE OF FLORIDA DEPARTMENT OF HEALTH, Respondent

TIMOTHY M. CERIO, General Counsel of the Department of Health in his official capacity and individual capacity, Respondent

WILLIAM N. MEGGS, State Attorney for the State of Florida in his official capacity, Respondent

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Beverly Betancur, N.D.™ respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is unpublished.

The Opinion of the United States District Court for the Northern District of Florida appears at Appendix B to the petition and is unpublished.

The Report and Recommendation of the United States District Court for the Northern District of Florida appears at Appendix C to the petition and is unpublished.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1254(1) to review the final judgment of the United States Court of Appeals for the Eleventh Circuit rendered on October 15, 2008.

A. Statement of Original Jurisdiction

Federal Jurisdiction in the Court of first instance over this cause of action is pursuant to 28 U.S.C. § 1331, in that this cause of action arises under the Lanham Act and the Constitution and/or laws of the United States. "In Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), the Supreme Court granted declaratory relief to a party challenging a state statute on preemption grounds, reaffirming the general rule that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve."

Federal Jurisdiction over this cause of action is also pursuant to 28 U.S.C. § 1332, diversity jurisdiction, because the case at issue involves parties with diversity of citizenship. The Petitioner is a resident and domiciliary of the State of Connecticut and the Respondents are residents and domiciliaries of the State of Florida and the amount in controversy is over seventy-five thousand dollars. However, 15 U.S.C. § 1121(a) of the Lanham Act, furthermore, provides:

> "The district and territorial courts of the United States shall have original jurisdiction, the courts of appeal of the United States shall have appellate jurisdiction, of all actions arising under this Act, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties."

Petitioner is therefore entitled to seek relief in this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1125(a)

Section 43(a) of the Lanham Act

False designations of origin, false descriptions, and dilution forbidden

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

15 U.S.C. § 1125(c)

Trademark Dilution Revision Act of 2006

(c) Dilution by blurring; dilution by tarnishment

(1) Injunctive relief

Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or

through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

(2) Definitions

(A) For purposes of paragraph (1), a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner. In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including the following:

(i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.

(ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark.

(iii) The extent of actual recognition of the mark.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

15 U.S.C. § 1092
Section 24 of the Trademark Act
Publication; not subject to opposition; cancellation.

Marks for the supplemental register shall not be published for or be subject to opposition, but shall be published on registration in the Official Gazette of the Patent and Trademark Office.

Dormant Commerce Clause
Article I, Section 8, Clause 3 of the United States Constitution.

The Congress shall have power to...regulate commerce with foreign nations, and among the several states...

United States Constitution, Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution, Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a cause of action for declaratory judgment, pursuant to Federal Question Jurisdiction, 28 U.S.C. § 2201 brought before United States District Court, the court of first instance, for the purpose of determining a question of actual controversy between the parties of whether or not under the Supremacy Clause of the United States Constitution federal trademark law can preempt a state statute or regulation that purports to nullify or dilute the value of a bona fide registered Certification Mark approved by the United States Patent and Trademark Office.

This is a cause of action for declaratory judgment, to declare the unconstitutionality of a state statute as applied and for injunctive relief to enjoin the Respondents from enforcing the statute in an unconstitutional manner, pursuant to 42 U.S.C.A. § 1983. This cause of action is for violation of Petitioner's rights under 15 U.S.C. §§ 1125(a) and (c) of the Lanham Act and constitutional tort pursuant to 42 U.S.C.A. § 1983 for deprivation of Petitioner's rights under the United States Constitution. (RI-58-3). Petitioner also seeks compensatory and punitive damages.

A. Standing

Petitioner is a beneficiary of the Certification Mark in question and, therefore, has standing to assert a constitutional claim that she has incurred economic injury as the result of the diminished value of the mark caused by Respondent's actions:

> "A palpable economic injury is sufficient to lay the basis for standing to sue, with or without a specific statutory provision for judicial review,

and allegations that a state licensing statute has the effect of precluding the Petitioner from practicing his profession and thereby violates rights secured by the federal constitution establish standing. It is not necessary that a party be arrested or prosecuted to be entitled to challenge the constitutionality of the statute." *Federal Procedure*, L. Ed. Vol. 10 § 23:25 (2004). (RI-58-4).

"In Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, (1974) the Supreme Court held that a federal court could provide proper declaratory relief against state criminal statutes when a prosecution was not pending." Petitioner intends to practice her profession in Florida and will suffer even greater future injury due to the threat of prosecution unless declaratory and injunctive relief is granted to prohibit the present and future threatened action. (RI-58-4).

The Naturopathic National Council, Inc.® is authorized to license use of the N.D.™ mark under U.S. Reg. No. 3,047,099. Betancur has standing to assert a § 43(a) claim because she is "a licensee" of the Naturopathic National Council, Inc.® (RI-58-1). Furthermore her license is part of the pertinent data of the *Certificate of Registration*. The *Certificate of Registration* states: "A copy of the Mark and pertinent data from the application are part of this certificate." (RI-58-2-2). The State of Florida Department of Health, et al., has usurped the N.D.™ mark and is using it improperly. "Courts have concluded that '15 U.S.C. § 1125(a)(1)' provides a cause of action to the licensee of a trademark or trade name against a competitor for improper use of the licensed mark." *See* Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc., 277 F. 3d 253 (2d Cir. 2002). "It has been held that one need not be the 'owner' or 'regi-

strant' of a mark in order to assert a § 43(a) infringement claim." *McCarthy on Trademarks and Unfair Competition*, Vol.5 § 27: 21 (2008).

"In any event, the question of ownership is immaterial to standing under § 43(a), since standing may lie with mere users of trademarks." Silverstar Enterprises Inc. v. Aday, 537 F. Supp. 236, 241 (S.D.N.Y 1982). 15 U.S.C. § 1125(a)(1) provides that 'any person' may bring a civil action. (RI-82-1) "The broad use of the words 'any person' rather than a narrower designation appears clearly to reflect a legislative purpose to protect competitive users of trademarks whether or not they are owners of the mark." D.M. & Antique Import Corp. v. Royal Saxe Corp. and Chelsea Import Co., Inc., 311 F. Supp. 1261 (1969) U.S. Dist. Lexis 9731; 166 U.S.P.Q. (BNA) 302.

B. Sovereign Immunity

Petitioner, Beverly Betancur, N.D.™ asserts that the State of Florida Department of Health et al., acting under color of state law, are not immune from suit because they violated 15 U.S.C. § 1125(a) of the Lanham Act. Congress has waived the immunity of a person, who acting in his official capacity, violates 15 U.S.C. § 1125(a) of the Lanham Act. The Respondents also are not immune from suit under 42 U.S.C.A. § 1983 because, acting under color of state law, they violated Petitioner's rights guaranteed by the United States Constitution. "An individual public official does not enjoy sovereign immunity from a declaratory judgment suit if the individual exceeds his or her statutory powers or acted unconstitutionally. When acting in their official capacities, state officials are not insulated from suit for declaratory or

injunctive relief." *In re* American Federation of Government Employees v. Phillips, 358 F. Supp. 60 (DC Dist. Col., 1973). Charron v. Picano, 811 F. Supp. 768 (DC RI, 1993).

Petitioner, Beverly Betancur, N.D.™ asserts that Respondents Timothy Cerio, Esq. and Dr. M. Rony François and Dr. Ana M. Viamonte Ros do not have qualified immunity from suit in their individual capacities because of their enforcement of a statute that violates the United States Constitution and 42 U.S.C.A. § 1983. In the seminal qualified immunity case Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court articulated the oft-quoted legal standard for analyzing a qualified immunity defense: "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818.

The Respondents, acting under color of state law, knowingly violated Petitioner's constitutional rights by threatening to apply regulations that were not intended to apply to her profession, thereby not only depriving Betancur of the legitimate right to practice her profession but nullifying and devaluing her naturopathic license. Dr. M. Rony François played an active role in this scheme because he decisively refused to remedy the violations of Petitioner's rights after many requests. Timothy Cerio, Esq. condoned the violations of Petitioner's rights because in his position of authority as General Counsel of the State of Florida Department of Health, he also could have remedied the violations. The General Counsel's willful failure to investigate and remedy the described

acts sanctioned the violations of Petitioner's rights under federal law.

Timothy Cerio, Esq. and Dr. M. Rony François being state officials should have known that the improper enforcement of a law that erroneously precludes a person from practicing their profession is offensive conduct that violates established federal and state norms. Timothy Cerio, Esq. and Dr. M. Rony François are not immune from suit in their individual capacities because they exceeded or abused their statutory authority. Dr. Ana M. Viamonte Ros is also culpable in that she concurred with the violations of Petitioner's rights by her predecessor and decisively refused to remedy the violations. The described acts committed against Petitioner by the Respondents are egregious and tortious acts that entitle Petitioner to redress.

C. Course of Proceedings and Disposition in the Courts Below

On March 13, 2007, Petitioner filed the Third Amended Complaint. (RI-58-1-17). On March 26, 2007, the District Court entered an Order granting leave to file the Third Amended Complaint (RI-63-1). On April 26, 2007, Respondents filed a Motion to Dismiss the Third Amended Complaint and Memorandum of Law (RI-72-1-25). On February 4, 2008, Magistrate Judge issued a Report and Recommendation recommending Defendant's Motion to Dismiss Plaintiff's Third Amended Complaint be granted and the Complaint be dismissed with prejudice (RI-83-1-18). On February 19, 2008, Petitioner filed objections to the Report and Recommendation (RI-84-1-5). On February 21, 2008, the District Court entered an Order of Dismissal adopting the Report and Recom-

mendation (RI-85-1-2). On March 19, 2008, a timely Notice of Appeal was filed (RI-87-1-2). On June 2, 2008, the Initial Brief of Appellants was filed (RI-1-1-23). On July 17, 2008 the Appellee Brief was filed (RI-2-1-27). On October 15, 2008, the Circuit Court issued an opinion affirming the lower court's dismissal of the Complaint.

D. Statement of the Facts

After the State of Florida denied Petitioner the right to practice traditional naturopathy erroneously requiring her to have a license when a license is not required to practice the profession, the Petitioner, Beverly Betancur, N.D.™ in 2004, founded the Naturopathic National Council, Inc.® (hereinafter "NNC") (RI-58-6).

The Naturopathic National Council, Inc.® was incorporated under the Laws of the State of Connecticut to serve as "a national licensing agency" for "traditional naturopaths." (Id.). The NNC "is approved under IRS Code 501(c)(6) as a medical board and has its principal place of business in the City of Stamford, County of Fairfield, State of Connecticut." (Id.).

During the latter part of 2004, before issuing N.D.™ licenses to traditional naturopaths, pursuant to its Certificate of Incorporation which states: "The purpose for which the corporation is formed is for the professional licensing and regulation of traditional naturopaths." Beverly Betancur, N.D.™ as CEO of the Naturopathic National Council, Inc.,® sent letters to the Department of Health of each of the 50 states, including the State of Florida Department of Health, et al., advising them that the Naturopathic National Council, Inc.® intended to engage in licensing activity. (RI-58-6).

The NNC was issued a *Certificate of Registration* by the United States Patent and Trademark Office for the purpose of issuing occupational licenses to traditional naturopaths, in class B (U.S. Cl. B), (RI-58-19, 20). This document confirms that a "certification mark" in the name of the "Naturopathic National Council, Inc."® registered on "January 17, 2006", and bearing "Reg. No. 3,047,099" was issued. Betancur attached to the complaint an N.D.™ license, which is part of the pertinent data of U.S. Certification Mark No. 3,047,099. (RI-58-2, 5).

On the basis that the certification mark, pursuant to Trademark Rules § 1306.09(b), required the Naturopathic National Council, Inc.® to license those who met the eligibility standards of the certification mark, the council issued licenses to naturopaths including, Jose Cañas, N.D.,™ a citizen of the State of Florida residing in Port St. Lucie. (RI-58-8).

Betancur, a resident of the State of Connecticut, obtained an N.D.™ degree from Trinity College of Natural Health on March 22, 2004 and holds a naturopathic license from the Naturopathic National Council, Inc.® (RI-58-2). The N.D.™ license states that Betancur "is licensed nationally by this Council as a Doctor of Naturopathy, N.D.™" The license, which is part of the official data of the certification mark is "current through 4/16/07." (Id.). However, the license is renewed annually and is current through 4/16/09.

Subsequent to her letter to the Florida Department of Health, the latter, on March 24, 2006, served on Betancur a written warning threatening to prosecute her and all traditional naturopaths who practice traditional naturopathy in Florida with credentials issued under the Federal certification mark, which was specifically issued for the licensing of tra-

ditional naturopaths, in class B (U.S. Cl. B). (RI-58-2, 2-3, 82-2, 8). The purported justification for the warning, which is erroneous, was that traditional naturopaths, licensed by the NNC, were subject to the licensing requirements of the State of Florida, which in fact had only imposed such requirements on "extended naturopaths," a class of naturopaths not recognized as such by the NNC on the basis that extended naturopaths prescribe, in the ordinary course of their practices, drug and surgical remedies rejected by traditional naturopaths.

In this way have the Respondents violated 15 U.S.C. § 1125(a) of the Lanham Act by, in effect, usurping the NNC's authority to license traditional naturopaths by deauthorizing the credentials of its licensees. *See Black's Law Dictionary's* 8th Ed. (2004) definition of **usurpation:** "The unlawful seizure of another's... authority." As will be discussed in greater detail below, the warning issued Petitioner by state officials prohibiting her use of the certification mark directly violated Petitioner's rights under the certification mark to represent herself as a licensed practitioner of traditional naturopathy, a profession that has not been subject to regulation under Florida State law, in contradistinction to extended naturopathy, which is subject to regulation. (*Initial Brief of Appellants* p.16).

In reaction to this threat, Betancur filed a complaint seeking a declaratory judgment that the State of Florida had no authority to restrict or prohibit the use of the certification mark under the circumstances and that the State of Florida's threats of prosecution were in violation of Petitioner's Federal rights. (RI-58-3). Specifically, Betancur sought a declaration that Florida's application of its Statute Chapter 462.17 to traditional naturopathy was un-

constitutional, and sought to enjoin Respondents from enforcing this statute against her. (Id. at 3). Betancur further claimed that Respondents violated § 1125(a) of the Trademark Law, by improperly identifying the certification mark with the practice of extended naturopathy, which is not intended to be regulated by the Naturopathic National Council, Inc.® (Id.). Betancur also claimed her rights under 42 U.S.C. § 1983 were violated by the enforcement of an unconstitutional law that abridged her privilege to practice naturopathic medicine. Betancur sought declaratory, injunctive and monetary damages as relief. (RI-58-14-16).

Respondents filed a Motion to Dismiss on grounds that the Department of Health and the individual Respondents contended that the Complaint failed to state a cause of action upon which relief may be granted. (RI-72-7). Respondents are state officials, including the Department of Health, the General Counsel for the Department of Health, the Secretary of the Department of Health, and the State Attorney for the Second Judicial Circuit, Leon County, Florida. (Id. at 1&2).

Betancur alleges that the Third Amended Complaint stated a claim of federal preemption of a state statute under which relief may be granted.

E. Standard of Review

Dismissal of a complaint, or a portion thereof, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted should not be ordered unless it appears beyond doubt that the Petitioner can prove no set of facts in support of her claims which would entitle her to relief. Connolly v. Gibson, 355 U.S. 41 (1957).

A court must accept the factual allegations of the Complaint as true. Shoultz v. American Airlines, 420 F. 3d 1332, (11th Cir. 2005). Petitioner, Beverly Betancur, N.D.™ filed the initial Complaint on behalf of the Naturopathic National Council, Inc.® a Connecticut corporation. Betancur subsequently, filed an Amended Complaint substituting herself for the NNC and appearing pro se. In a case such as this, where Betancur proceeded as a pro se Petitioner, her pro se pleadings "are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." Tannenbaum v. United States, 148 F. 3d 1262 (11th Cir. 1998).

F. History of Naturopathy

Traditional naturopathy is a branch of medicine that promotes healing using nature's medicinal resources: Pure air, water, sunshine, foods, herbs, vitamins, minerals and exercise. The theory behind traditional naturopathy is that medical remedies derived from natural sources are best able to restore the body's equilibrium, which is essential for long-term health. The use of natural remedies has a long history and presupposes that the underlying objective is to create the conditions necessary to allow the body to heal itself. As one authority has put it: "The basic principles underlying naturopathic medicine are: The body has the power to heal itself. Self healing is considered more effective than introducing chemical substances into the body." *Cornell Illustrated Encyclopedia of Health*, Naturopathy, 1st Ed. p. 810 (2002).

Traditional naturopathy does not embrace the philosophy advocated by the mainstream medical profession, which supports eradicating disease by

surgery and/or by the administration of commercially made medications. Instead, traditional naturopaths (N.D.'s) are dedicated to ascertaining the fundamental causes of chemical and metabolic imbalances in the body. Traditional naturopaths advocate the theory that when the immune system is supported, harmony and equilibrium can be restored to the body. The discipline's focus on preventive medicine is consistent with current trends generally acknowledged even by modern medical science that nutritional imbalances, toxicity and stress factors can be precursors of or contribute to the development of a disease process. It is the promotion of Naturopathy in its most pure and traditional form that is the raison d'être of the NNC.

Hippocrates, the father of medicine, declared between 460 B.C. and 370 B.C. "Let your food be your medicine, let your medicine be your food." and "First do no harm." Traditional naturopaths believe that, over the years, medicine began to deviate from this principle through the development of technology that made it possible for doctors to prescribe man-made drugs to patients. From this development emerged a multi-billion dollar medical industry, which traditional naturopaths have come to conclude, unduly emphasizes the use of drug therapy and surgery over healthier and more cost-effective methods. In recent times, with the discovery that many man-made drugs have harmful side-effects and that the proliferation of antibiotics has served to create even more virulent and drug-resistant forms of disease, the study of Naturopathy has incurred a renaissance of sorts as people have begun to search for alternative treatments to those advocated by mainstream medical science.

Naturopathic medicine was introduced in the United States in 1905 by Dr. Benedict Lust, M.D. N.D.,™ D.C, and D.O.

"Dr. Benedict Lust, naturopathic physician, was born in Michelbach, Baden, Germany. Arriving in this country in 1892, attended the New York Preparatory College. He was graduated at the Universal Osteopathic College in 1897 and at the Eclectic and Naturopathic College in 1904, and received an M.D. degree from the Eclectic Medical College in New York, in 1914. His work as a naturopath began in 1896 when he established a health center and health food store in New York City, one of the first of its kind in America. In the same year he founded the American School of Naturopathy (incorporated in 1905) and the American School of Chiropractic, a coeducational institution for the training of naturopaths and chiropractors." *National Cyclopædia of American Biography*, Lust, Benedict, Vol. XXXII, p.505 (1945).

Dr. Benedict Lust, the father of naturopathy, stated definitively: *"Naturopaths are Doctors minus Materia Medica (drugs) and Surgery." Striding Through the States,* p.82 (1933). "In summing up a part of the theory on which he worked, he declared that 'most people die from the effect of wrong living and drugs. Cancer can be cured by natural processes without medicine or surgery. Most diseases are only aggravated by the use of medicine.' " Furthermore he did not believe in vaccination or vivisection. In conjunction with the American School of Naturopathy he founded the American School of Physio-

therapy." *National Cyclopædia of American Biography*, Lust, Benedict, Vol. XXXII, p.505 (1945). "He purchased the rights to the term naturopathy from John H. Scheel in 1902 and publicized himself as a naturopath." *Gale Encyclopedia of Alternative Medicine*, Naturopathic Medicine, Vol. 3, p.1245 (2001).

G. Two Branches of Naturopathic Medicine

"In 1901, he [Dr. Benedict Lust] organized the Naturopathic Society of America." *Gale Encyclopedia of Alternative Medicine*, Naturopathic Medicine, Vol. 3, p.1245 (2001). The Naturopathic Society of America was reorganized as the American Naturopathic Association (ANA) in 1919. In 1921, Lust was elected president for life. Shortly after his death in 1945, the organization split in two because of philosophical differences, forming the Eastern ANA and the Western ANA. The Eastern ANA preserved the philosophy of the American School of Naturopathy founded in 1905 and are known today as "traditional naturopaths". In contrast, the Western ANA decidedly rejected the traditional theory of naturopathy.

The philosophy of the Western ANA gave rise in 1956 to the establishment of the National School of Naturopathic Medicine, in Portland Oregon. National School of Naturopathic Medicine adopted the philosophy of the School of Physiotherapy founded by Dr. Lust and enmeshed it with drugs and surgery, then misleadingly named it a School of Naturopathic Medicine usurping the "N.D.™ mark, which by 1936 had gained prominence." *Chronicle-Telegram*, Elyria, Ohio. (Friday, January 24, 1936). The State of Florida joined in the usurpation scheme of the

N.D.™ title in 1959 by licensing this counterfeit branch of naturopathy that is called "naturopathy with an extended scope of practice" causing unfair competition in violation 15 U.S.C.A. § 1125(a). See *Sunrise Report* p.45 (2004). "The Lanham Act is a shield intended to prevent competitors from usurping the trademark owner's reputation." Beer Nuts, Inc. v. Clover Club Foods Co., 605 F. Supp. 855 (D. Utah 1985).

This disjunction between traditional and extended naturopathy is at the core of the dispute between Petitioner and the State of Florida in this case, i.e. the Florida legislature intended to regulate extended naturopathy, but in enforcing these rules has inadvertently sought to impose them on traditional naturopaths. Specifically, in 1985, the State of Florida enacted Chapter 462.17 F.S., which prohibited the practice of extended naturopathy without a license except in the case of seven persons who were allowed to continue practicing "extended naturopathy" under a grandfathering clause.

The State of Florida's blanket use of the term "naturopathy" to compel the licensure not only of extended naturopaths but also, as it has turned out, of traditional naturopathy, is not only an unconstitutional extension of the state's licensing laws, but has violated the certification mark of the Naturopathic National Council, Inc.,® which specifically identified it as the licensing authority for traditional naturopaths. The Florida Department of Health's erroneous construction and application of the law to continue to license extended naturopathy has served to create confusion in violation of Section 43(a) of the Lanham Act.

Subsequent to the enactment of Chapter 462.17 F.S., the State of Florida and several other states

that license extended naturopathy have by erroneous interpretation extended those laws making it illegal for traditional naturopaths to practice using their licenses issued by the Naturopathic National Council, Inc.® It was in reaction to these measures that, on February 6, 2006, Betancur issued a Cease and Desist Order to the State of Florida advising that the Naturopathic National Council, Inc.® owns the mark Doctor of Naturopathy, N.D.™ and its derivative Doctor of Naturopathic Medicine.™ (Id. at 7). The manner in which Florida Statute Chapter 462.17 has been applied has negatively impacted the discipline of traditional naturopathy, which is not required to be licensed in accordance with Section 11.62(6) F.S. (a statute that succeeded the enactment of Chapter 462.17). *See* Section 11.62(6) F.S. (1993); also *Sunrise Report* p.45 (2004).

The State of Florida should not be allowed to damage the value of the certification mark held by the NNC by inappropriately identifying "extended naturopathy", which is a profession subject to state regulation, with traditional naturopathy, which has not been so regulated. This confusion is being willfully perpetuated by the State of Florida in violation of Petitioner's rights as a licensed "traditional naturopath."

H. Certification Marks at Issue in This Case

A certification mark "is a special creature created for a purpose uniquely different from that of an ordinary service mark or trademark..." *In re* Florida Citrus Commission, 160 U.S.P.Q. 495 (TTAB 1968).

> "Trade or service marks and certification marks are different and distinct types of marks, which serve different purposes. A

trademark or service mark is used by the owner of the mark on his or her goods or services, whereas a certification mark is used by persons other than the owner of the mark." *Trademark Manual of Examining Procedures* (TMEP) Chapter 1300 § 1306.05(a) (2007).

"There are generally three types of certification marks. First, there are certification marks that certify that goods or services originate in a specific geographic region. Second, there are certification marks that certify that the goods or services meet certain standards in relation to quality, materials, or mode of manufacture. Third, certification marks may certify that the work or labor on the products or services was performed by a member of a union or other organization, or that the performer meets certain standards." *TMEP* § 1306.01 (2007).

15 U.S.C. § 1064(4) provides that certification marks can be cancelled for the following reasons:

"At any time in the case of a certification mark on the ground that the registrant (A) does not control, or is not able legitimately to exercise control over, the use of such mark, or (B) engages in the production or marketing of any goods or services to which the certification mark is applied, or (C) permits the use of the certification mark for purposes other than to certify, or (D) discriminately refuses to certify or to continue to certify the goods or services of any person who maintains the standards or conditions which such mark certifies."

Genericness is not relevant to certification marks because registration does not restrict the common use of a certification mark because its: *"Purpose is to*

Certify, not to Indicate Source. A certification mark does not indicate origin in a single commercial or proprietary source. In certifying, the same mark is used on the goods or services of many different producers." *TMEP* § 1306.01(b) (2007). The mark "Naturopathic National Council, Inc.®" U.S. Reg. No. 3, 047,099 is a certification mark not an ordinary trademark or service mark. The mark is used to certify that the individual is "licensed" as a Doctor of Naturopathy, N.D.™

> "Occasionally, it is not clear whether a term is being used to certify that work or labor relating to the goods or services was performed by someone meeting certain standards or by members of a union or other organization to indicate membership, or whether the term is merely being used as a title or a degree of the performer to indicate professional qualifications. Matter that might appear to be simply a title or a degree may function as a certification mark if used in the proper manner." *TMEP* § 1306.03 (2007).

The N.D.™ mark functions as a certification mark because it is used to indicate that the individual meets a wide spectrum of standards beyond a degree and is licensed to render services as a naturopathic physician. The NNC is a licensing agency not an educational institution and so registration of the N.D.™ mark does not restrict use of the mark by educational institutions to grant degrees or board certification. However, the United States Patent and Trademark Office (USPTO) refused registration of the mark Doctor of Naturopathy, N.D.,™ U.S. Serial No. 76642489, claiming that the mark as a degree title is generic, although registration was not sought as a degree title.

The N.D.™ mark is not generic; to the contrary, it is a famous mark. The "purchase of the mark by Dr. Benedict Lust in 1902" infers that it is a made-up or coined word, which makes it distinctive. (Id. at 18). A distinctive mark is usually fanciful, arbitrary or suggestive." *Black's Law Dictionary,* 8th Ed. (2004). A suggestive mark is: "A trademark that suggests rather than describes the particular characteristics of a product, thus requiring a consumer to use imagination to draw a conclusion about the nature of the product." *Black's Law Dictionary,* 8th Ed. (2004).

The certification mark is suggestive because it is composed of the prefix "*natur*", which is suggestive of *natural,* the letter *"o"* used as a connective to join the word elements, and *"pathy,"* a Greek suffix meaning disease, requiring consumers to use imagination to draw a conclusion about the nature of the service. The common or generic term is Doctor of Natural Medicine. The "Doctor of Naturopathy"™ mark in its special meaning denoting a licensed "N.D.™" or a licensed naturopathic physician is distinctive and entitled to protection from dilution as a famous mark.

On March 21, 2005, the Naturopathic National Council, Inc.® filed for registration of the mark Doctor of Naturopathic Medicine on the Principal Register, U.S. Serial No. 76633904; however, the USPTO held that the mark was descriptive causing the NNC to file for registration of the mark on the Supplemental Register. On April 18, 2007, the mark Doctor of Naturopathic Medicine, U.S. Serial No. 78851026, was "APPROVED FOR REGISTRATION ON THE SUPPLEMENTAL REGISTER." (RI-82-2, 22). On May 11, 2007, relevant to the case, Betancur notified the Court of the mark's approval for registration; at

that juncture, Phillip P. Quaschnick, Attorney for the Respondents opposed the registration of the mark. Subsequently, the USPTO reversed itself and withdrew approval of the registration. (RI-82-2, 25).

USPTO regulations and trademark law are quite clear: Application for registration on the Supplemental Register is not subject to opposition as provided by 15 U.S.C. § 1092. "Although the mark in an application for registration on the Principal Register is published for, and subject to opposition, the mark in an application for registration on the supplemental register is not." *Trademark Board Manual of Procedures*, Chapter 200 § 205 (2009). We submit that the United States Patent and Trademark Office's sudden reversal was erroneous in that it was based on the unauthorized objection to the registration interposed by the Respondents in violation of 15 U.S.C. § 1092.

It is apparent that Respondents intentionally sought to sway the discretion of the USPTO by willfully interposing an objection, which was precluded by law. As such, the NNC's application for registration should be reinstated and its mark duly registered on the supplemental register in conformity with the USPTO's original decision. The mark, Doctor of Naturopathic Medicine, U.S. Serial No. 78851026, was improperly withdrawn on the basis of genericness. In any event, the NNC owns the "Doctor of Naturopathy"™ and "N.D."™ certification marks as a function of common law: "[T]he right to a trademark at common law is not adversely affected by the cancellation of its registration." Callman, Vol. 3 Unfair Competition. *Trademarks and Monopolies* § 86.1 (b) (3d ed. 1969). *See* also Skil-Craft Corp. v. Lober & Assoc., 138 F. Supp. 313 (S.D.N.Y. 1956).

I. What are Common Law Rights?

> Federal registration is not required to establish rights in a trademark. Common law rights arise from actual use of a mark. Generally, the first to either use a mark in commerce or file an intent to use application with the Patent and Trademark Office has the ultimate right to use and registration." www.uspto.gov *What are Common Law Rights*? (2008).

The field of traditional naturopathy has the right to the N.D.™ mark because it was the first to employ the mark; e.g. Dr. Jethro Kloss, a traditional naturopath, employed the mark in Florida in 1938. *Back to Eden* Classic Ed., p.15 (2003). The Naturopathic National Council, Inc.® has the ultimate right to register the mark because it is the licensing body of traditional naturopaths and the first to license practitioners of the art and science of traditional naturopathy, the rightful beneficiaries, of the mark. The NNC also has the ultimate right to register the mark because it was the first to file an application for registration with the USPTO and would have been the registrant had the mark not been illegally withdrawn. The NNC has common law rights to enforce its ownership rights in the mark "Doctor of Naturopathy"™ ("N.D.").™ "The common-law rights of a trade-mark refer to the ownership of the mark, which includes the right to protection against its infringement by others." Callman, Vol. 4 *The Law of Unfair Competition and Trade-Marks*, § 97.3(c)(3) (2d ed. 1950). The State of Florida does not have the right to the N.D.™ mark because they have diluted the distinctiveness of the mark by tarnishing it with drugs and surgery in violation of 15 U.S.C.A. § 1125(c)(1) of the Trade mark Dilution Revision Act of 2006.

REASONS FOR GRANTING THE PETITION

This Supreme Court should grant this petition because the United States Court of Appeals for the eleventh Circuit failed to address in its opinion and determination an important question of federal law, which, inter alia, raises a novel issue of whether and to what extent the state police power can regulate the use of a registered certification mark. We submit that the Court of Appeals' determination violated settled authority that federal law can, under certain circumstances, preempt the state's power to regulate the licensing of certain professions. *See* Sperry v. Florida ex Rel. Florida Bar, 373 U.S. 379 (1963), in which this Court unanimously ruled that *Sperry* could not be prevented by the police power of the State of Florida from advertising and providing services as a patent agent authorized under Federal patent law. Likewise, the Supremacy Clause, invoked by Sperry, mandates that Florida state licensing regulations cannot interfere with Betancur's right to exercise her rights under the duly authorized certification mark, which provided that the NNC had the national authority to license "traditional naturopaths."

The Supreme Court should, alternatively, grant this petition because the case at issue involves the unconstitutional application of a state regulatory statute, which was not intended to regulate traditional naturopaths, but which has been employed by the Florida Department of Health to prohibit Petitioner from engaging in the practice of traditional naturopathic medicine. *See* Marbury v. Madison, 5 U.S. 137 (1803) in which the U.S. Supreme Court held that it had authority to invalidate legislative and executive actions that violate the U.S. Constitu-

tion. The Supreme Court should further grant this petition because the case involves issues of importance beyond the particular facts and parties involved in that there are currently seventy practitioners, across the nation, who are licensed by the Naturopathic National Council, Inc.® and who are also under the threat of criminal prosecution because laws similar to those of Florida have been misapplied to restrict naturopathy in all its forms. We also submit that because there are potentially hundreds of other naturopathic practitioners providing care across the United States, who are potentially subjects of NNC Certification, which purports to enforce professional standards, the inability of the NNC to protect and enforce its certification mark could have far-reaching, deleterious implications for members of the public seeking qualified practitioners of traditional naturopathic medicine.

A. Police Power

The concept of the federal police power was expanded under the "New Deal Era" to grant power to the federal government under the Commerce Clause of the United States Constitution. "The federal government exercises vast public health powers, both to regulate public health and to provide for public health services." *Encyclopedia of Public Health*, Public Health and the Law, Vol. 3, p.992 (2002). The State of Florida is in violation of the Dormant Commerce Clause (Article I, Section 8, Clause 3) unduly burdening interstate commerce by prohibiting Petitioner to use her license under a federal certification mark in violation of 15 U.S.C. § 1121(b). "The power to regulate interstate commerce allows Congress to regulate whatever passes in commerce between the

states, as well as whatever affects interstate commerce." *Encyclopedia of Public Health*, Public Health and the Law, Vol. 3, 992 (2002). "Title 15 U.S.C. § 1121(b) forbids interference with a registered trademark." *See* H. Rep. No. 778, 97th Cong. 2d Sess. 3, reprinted in 1982 U.S.C.CA.N. 2621. "Federal trademarks are preemptive in nature." Beatrice Foods Co. v. Wisconsin, 223 U.S.P.Q. (BNA) 75, 1983 U.S. Dist. Lexis 11771 (W.D. Wisc. 1983). *In* Gibbons v. Ogden, 9 Wheat. 1 (1824) the Court held that: "The law of the state, though enacted in the exercise of powers not controverted, must yield when incompatible with federal legislation." The police power of the state, which is defined by the Tenth Amendment of the U.S. Constitution as constituting those rights afforded the states not reserved by the Constitution to the Federal Government are, themselves, subject to due process and other limitations. *Black's Law Dictionary*, 8th Ed. (2004).

Florida's "*Sunrise Act*": Section 11.62(2)(a) F.S. limits the regulatory activity of the police power of Florida to professions that potentially can cause discernible harm to the public's health, safety and welfare. The 2004 *Sunrise Report on Proposed Licensure of Naturopathic Physicians*, prepared in compliance with Section 11.62(6) F.S., provides that the non-invasive practice of traditional naturopathy is not required to be licensed under Florida Statute Section 11.62(2) because it does not cause any discernable harm to the public health, safety and welfare. *Sunrise Report* p. 45 (2004).

The *Sunrise Act* exempted traditional naturopathy from regulation and this Act has not been expressly succeeded or contradicted by any subsequent enactment. Insofar as the State of Florida has failed to exercise legitimate police power to impose

restrictions on the practice of traditional naturopathy, it has in effect ceded such power to Federal law, which has invested in the NNC, by way of the certification mark at issue here, the authority to license persons who profess to be traditional naturopaths. In this respect, the State of Florida Department of Health, et al, abused its power by issuing a warning on March 24, 2006 (Doc. 58-2, 14) threatening to prosecute Betancur and all traditional naturopaths who practice traditional naturopathy in Florida with credentials issued under the federally registered mark NATUROPATHIC NATIONAL COUNCIL, INC.,® "FOR: NON-PROFIT SERVICE ORGANIZATION THAT ISSUES OCCUPATIONAL LICENSES TO TRADITIONAL NATUROPATHS, IN CLASS B (U.S. Cl. B.) approved under the 1946 Act of Congress." U.S. Reg. No. 3,047,099. (*See* Trademark Doc. 58-2, 3).

> "A valid federal regulation of the subject supersedes conflicting state legislative enactments and decisions and actions of state judicial or administrative bodies. If Congress has clearly demonstrated its intent to regulate an entire field, then the state is powerless to enact subsequent legislation even if no conflicts exist between state and federal law. This type of congressional action is known as Federal PREEMPTION of the field." *West Encyclopedia of American Law* 2d., Vol. 3, *Commerce Clause, p. 3* (2005).

Section 462.17 Florida Statutes (2006), which purports to require the licensure of extended naturopaths, and is the provision on which the Department of Health justified its warning to Betancur, is clearly ultra vires the authority of that statute in clear violation of Petitioner's trademark rights. (RI-

82-3). The Department of Health's threats are not merely theoretical as there is evidence that arrests pursuant to Section 462.17 F.S. have indeed, occurred. *See* The Florida Dept. of Health, *Div. of Medical Quality Assurance*, Report (2004) in the section concerning the arrest of Anida Bruce, N.D.™ entitled, "*Unlicensed Activity Unit's Efforts Lead to More Arrests.*" (RI-82-3). The article states that "[t]he Florida Department of Health's (DOH) unlicensed activity unit's efforts have led to many success stories this quarter. The unit has partnered with local law enforcement across the state to accomplish some notable arrests." (RI-82-2, 4). The State of Florida Department of Health, et al., exceeded their statutory authority or acted unconstitutionally by partnering with law enforcement to enforce Section 462.17 F.S. (2006), an unconstitutional statute. The extent of their wrong is of even greater magnitude because they are not vested with statutory enforcement powers. (RI-82-4-5).

The manner in which the Florida Department of Health has applied Florida Statute Chapter 462.17 is in violation of the Tenth Amendment to the United States Constitution and § 11.62(2)(b) F.S. insofar as it is attempting to impose licensing restrictions on traditional naturopaths without any legal basis. In commenting on a state's right to regulate a profession under the Tenth Amendment, the *U.S. Department of Education* stated: "The competent authority for persons seeking to work in the United States in regulated occupations is the licensing authority at the appropriate state or territorial level that monitors that occupation." www.ed.gov, *U.S. Department of Education, Competent Authority* (2004). (RI-58-9). However, the right to license a profession is not an exclusive right of the state: when the state chooses

not to regulate, the licensing power resides with the national association: "National associations... may set policy and regulate standards within their areas of interest and jurisdiction." (RI-82-11). www.ed.gov, *U.S. Department of Education, Competent Authority* (2004).

In sum, the Florida Department of Health is not the competent authority to preclude Petitioner from representing herself as an NNC licensed traditional naturopath and in this respect has illegally usurped the authority of the NNC to license members of the profession of traditional naturopathy as provided by the NNC's federally registered certification mark.

B. Florida Law

Florida Statutes Chapter 462.17(5) (2006) provides that:

> "any person who shall: (5) Practice or advertise to practice naturopathy or use in connection with her or his name any designation tending to imply or to designate the person as a practitioner of naturopathy without their being lawfully licensed and authorized to practice naturopathy in this state; shall be guilty of a felony of the third degree, punishable as provided in s.775.082., s.775,083 or s.775,084.

We submit that although Section 462.17(5) refers to "naturopaths" generally, the intent and purpose of the statute was to impose licensing requirements on extended naturopaths and not traditional naturopaths. This is supported by the express language of the Sunrise Act, § 11.62(2) F. S., which provided that professions like traditional naturopathy would not be subject to licensing requirements. The Sunrise Act, § 11.62(2) F. S. relating to the regulation of an

unregulated profession or occupation established that the State of Florida would only regulate a profession under certain defined circumstances:

> (a) "That no profession or occupation be subject to regulation by the state unless the regulation is necessary to protect the public health, safety, or welfare from significant and discernable harm or damage and that the police power of the state be exercised only to the extent necessary for that purpose; and" (b) "That no profession be regulated by the state in a manner that unnecessarily restricts entry into the practice of the profession or occupation or adversely affects the availability of the professional or occupational services to the public." *Sunrise Act* § 11.62(2)(a)(b) F.S. (1993).

"Section 11.62(6), Florida Statute, requires that when making a recommendation concerning proposed legislation providing for new regulation of a profession, a legislative committee shall determine: Whether the regulation is justified based on the Sunrise Review Criteria." The 2004 *Sunrise Report on Proposed Licensure of Naturopathic Physicians with an extended scope of practice* expressly distinguished "traditional naturopathy" from "extended naturopathy", finding that the former did not present a potential for public harm sufficient to justify the imposition of licensing regulations:

> "The department and other sources indicate there is a risk of harm to the public from licensing naturopathic physicians with an expanded scope of practice. [This does not apply to appellant who is a traditional naturopath]. Licensure of naturopathic physicians [with an extended scope of practice] would negatively impact practitioners of traditional and alter-

native health healing techniques that currently do not have to be licensed; and Licensure of naturopathic physicians [with an extended scope of practice] would negatively impact the non-invasive practice of traditional naturopathy..., which is not required to be licensed under Florida Statutes." *Sunrise Report on Proposed Licensure of Naturopathic Physicians,* Florida House of Representatives, p.45. (2004).

Insofar as there has not been any legislative report since the Sunrise Report supporting the regulation of traditional naturopathy and the record is devoid of any evidence that the Florida legislature has intended to supersede and nullify the Sunrise Act, the Department of Health's effort to impose licensing requirements on traditional naturopathy is unsupported by state law. In exercising its authority ultra vires of applicable state law, the Department has also violated Petitioner's Federal right to represent herself as an NNC licensed traditional naturopath. The Department's unlawful actions have served to diminish the value of the certification mark, which affords the NNC the authority to license traditional naturopaths.

C. Trademark Dilution

The N.D.™ mark has become a distinctive mark because of its 100-year history of identifying the term with "naturopathy". We submit that the term is entitled to protection as a famous mark. As previously noted in the *Chronicle-Telegram,* the N.D.™ mark was first used by traditional naturopaths in 1905 and by 1936 was a mark that was widely used to identify practitioners of traditional naturopathy. Although Dr. Lust's School of Naturopathic Medicine

closed its doors upon his death, the term "naturopathy" survived to identify the profession he founded; because the term has been and continues to be closely identified with natural medicine it meets the requirements of a famous mark in accordance with 15 U.S.C. § 1125(c)(2)(i)(ii)(iii). Today, the mark is widely recognized by the general public of the United States as a designation for a distinct profession. The volume of goods and services identified with the profession of traditional naturopathy is over 4 billion dollars annually. (Initial Brief of Appellants, p.14). As such, the actions of the State of Florida have served to devalue and dilute the value of the N.D.™ mark as a distinctive mark by erroneously equating and identifying it with extended naturopathy, which sanctions the use of drugs and surgery, a practice that is antithetical to traditional naturopathy. In the process the State of Florida has usurped the term "naturopathy" to define both disciplines equally; thereby, sowing seeds of confusion among consumers of natural and alternative forms of medicine who seek practitioners who adhere to the traditional practice. *See* Freeburg v. François, 2006 WL 2362046, at 9 (N.D. Fla. 2006).

The state's action has also served to endow extended naturopaths with the legitimacy of persons who practice traditional naturopathy, a profession that philosophically rejects the use of drugs and surgery as a legitimate naturopathic practice. *See* Beer Nuts, Inc. v. Clover Club Foods Co., 605 F. Supp. 855 (D. Utah 1985), wherein the court held: "The Lanham Act is a shield intended to prevent competitors from usurping the trademark owner's reputation." Petitioner has been adversely affected by the actions of the state health officials and is entitled to relief under 15 U.S.C. § 1125. (*Initial Brief of Appellants*,

p.14-15). In this case, the State of Florida should be enjoined from taking actions intended to undermine the integrity of traditional naturopathy and therefore, the value of this profession's registered and common law trademarks. *See* 15 U.S.C § 1125(c)(1) Trademark Dilution Revision Act of 2006:

> "Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury."

D. Summary

The State of Florida has sought to enforce a statute in a manner that not only violates state due process but unduly interferes with Petitioner's rights as a beneficiary of a certification mark identified with the practice of traditional naturopathy. The state's actions have served to devalue and dilute the value of these marks while interfering with the role of the Naturopathic National Council, Inc.® in its capacity as a trade association endowed with the authority to license traditional naturopaths. Indeed, the State of Florida has attempted to criminalize persons who employ the certification mark, although the State of Florida has not enacted any legislation expressly stating its intention to regulate traditional naturopaths. In addition to the Department of

Health's unconstitutional restriction of the practice of traditional naturopathy, it has diluted the profession's certification mark by legislatively identifying extended naturopathy, which arguably should be regulated, with traditional naturopathy, which was recognized by Florida legislative committee as a separate profession, which did not require regulation. The state's erroneous blunderbuss use of the term "Naturopathy" to designate "extended naturopathy" is also likely to create confusion among actual and potential consumers of traditional naturopathic services which is a situation that is detrimental to the public welfare.

CONCLUSION

For the reasons stated herein, Petitioner hereby request the Court grant this writ of certiorari and reverse the decision of the United States Court of Appeals for the Eleventh Circuit, which erroneously affirmed the dismissal of the Petitioner's Third Amended Complaint with prejudice.

Respectfully submitted,

/s/ Gary Lee Printy
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Date: January 12, 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 08-11252

District Court Docket No.
06-00428-CV-4-RH-WCS

BEVERLY BETANCUR,

Plaintiff-Appellant,

Versus

STATE OF FLORIDA DEPARTMENT OF HEALTH,
TIMOTHY M. CERIO,
General Counsel,
DR. M. RONY FRANCOIS,
In his official capacity as Secretary of the
Department of Health,
WILLIAM N. MEGGS,
In his official capacity as State Attorney for the
State of Florida,
DOCTOR ANA M. VIAMONTE ROS,
In her official capacity as Secretary of the
Department of Health,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: October 15, 2008
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy
Issued as Mandate: November 25, 2008, Atlanta GA

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-11252
Non-Argument Calendar

D.C. Docket No. 06-00428-CV-4-RH-WCS

BEVERLY BETANCUR,

Plaintiff-Appellant,

Versus

STATE OF FLORIDA DEPARTMENT OF HEALTH,
TIMOTHY M. CERIO,
General Counsel,
DR. M. RONY FRANCOIS,
In his official capacity as Secretary of the
Department of Health,
WILLIAM N. MEGGS,
In his official capacity as State Attorney for the
State of Florida,
DOCTOR ANA M. VIAMONTE ROS,
In her official capacity as Secretary of the
Department of Health,

Defendants-Appellees.

Entered: October 15, 2008
Thomas K. Kahn, Clerk

Appeal from the United States District Court
for the Northern District of Florida

(October 15, 2008)

Before ANDERSON, HULL and PRYOR, Circuit Judges.

PER CURIAM:

Beverly Betancur appeals the dismissal of her complaint for failure to state a claim regarding the denial of her application for a license to practice naturopathy.

We Affirm.

I. BACKGROUND

Betancur applied to the Florida Department of Health in 2004 for a license to practice naturopathy. After the Department of Health denied Betancur's application, Betancur founded the Naturopathic National Council in Connecticut. The Council purported to be "a national licensing agency."

Two years after incorporation, the Council registered its name as a trademark. The Council issued a document stating that Betancur was "nationally licensed" as a "Doctor of Naturopathy, N.D." Betancur, as the Chief Executive Officer of the Council, demanded that the Health and Human Services Appropriations Committee of the Florida Senate "cease and desist" its use of the title "Doctor of Naturopathy." Betancur asserted "exclusive rights" to the

titles "Doctor of Naturopathic Medicine" and "Doctor of Naturopathy, N.D." Betancur also declared that the Council held the trademark to "Naturopathic National Council, Inc."

State health officials Rony Francois, Timothy Cerio, and Dr. Ana Viamonte Ros told Betancur that Florida ceased the licensing of naturopaths in 1959. See Fla. Stat. § 462.023, with the exception of seven individuals allowed to practice under a grandfather statute, see id. § 462.2001 and the practice of naturopathy without a state license is a third degree felony, see id. § 462.17(5). Betancur responded that the Council had exclusive authority to license naturopaths; Florida could not prevent a naturopath from practicing; and the naturopaths who practiced under the grandfather statute held fraudulent licenses. The Council later purportedly licensed several naturopaths, including Jose Canas, a Florida citizen.

Betancur filed a complaint against the Department of Health, Cerio, Dr. Viamonte Ros, and State Attorney William Meggs. In her third amended complaint, Betancur sought a declaratory judgment to determine "whether or not under the Supremacy Clause...a federal trademark pre-empts an inconsistent state statute or regulation." Betancur alleged that Florida violated the Thirteenth Amendment "by forcing [her] and traditional naturopaths...into involuntary servitude by forcing them out of their profession." Betancur also alleged that the Florida officials "caused trade identity confusion" by using the "trademarked title Doctor of Naturopathy, N.D. or its derivatives," see 15 U.S.C. § 1125(a), and violated her rights under the Tenth and Fourteenth Amendments by denying her a license to practice naturopathy, see 42 U.S.C. § 1983.

The officials moved to dismiss the complaint and the district court granted the motion.

II. STANDARD OF REVIEW

We review de novo the dismissal of a complaint for failure to state a claim. Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1161 (11th Cir. 2007). We accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff. Id.

III. DICUSSION

Betancur argues that, when the Council trademarked its name to "issue[ ] occupational licenses to traditional naturopaths," the Council acquired exclusive rights to license naturopaths and to confer the title "Doctor of Naturopathy, N.D." she argues that her trademark preempts the authority of Florida to regulate the practice of naturopathy and the continued licensing of several naturopaths violates her trademark. Betancur also argues that Florida officials violated her civil rights. These arguments fail.

States retain the police power to regulate professions, such as the practice of medicine. Watson v. State of Maryland, 218 U.S. 173, 176, 30 S. Ct. 644, 646 (1910) (recognizing the authority of the states to regulate the practice of medicine). Betancur offers no rational argument that her ownership of the mark "Naturopathic National Council, Inc." preempts the authority of Florida to regulate and license the practice of naturopathy. Betancur's complaint of trademark infringement, which is based on her argument

that the Council has the exclusive right to regulate the practice of naturopathy, also is meritless.

Betancur's complaint that Florida violated her civil rights also fails. The licenses given to several individuals to practice naturopathy under a grandfather clause, Fla. Stat. § 462.2001, is not an arbitrary or unreasonable regulation that violated Betancur's right to equal protection. See Watson, 218 U.S. at 173, 30 S. Ct. at 646 (exemption for physicians who had six years of practice from registration did not violate equal protection rights of less experienced physicians). Betancur has no right under Florida law to be granted a license and has no liberty or property interest protected by due process. See Grayden v. Rhodes, 345 F.3d 1225, 1232 (11th Cir. 2003). Betancur's final argument that the refusal to license naturopaths deprives her of the opportunity to pursue her livelihood does not, as she contends, implicate the Thirteenth Amendment, which prohibits forced servitude. United States v. Kozminski, 487 U.S. 931, 942, 108 S. Ct. 2751, 2760-61 (1988).

IV. CONCLUSION

The dismissal of Betancur's complaint is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BEVERLY BETANCUR

VS Case NO. 4:06cv428-RH/WCS

STATE OF FLORIDA,
DEPARTMENT OF
HEALTH, ET AL.,

JUDGMENT

Defendants' motion to dismiss plaintiff's third amended complaint (document 72) is GRANTED. The complaint is dismissed with prejudice for failure to state a claim upon which relief may be granted.

WILLIAM M. McCOOL, CLERK OF COURT

February 21, 2008 s/Pam Lourcey
Date Deputy Clerk: Pam Lourcey

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

BEVERLY BETANCUR

Plaintiff,

v. CASE NO. 4:06cv428-RH/WCS

STATE OF FLORIDA
DEPARTMENT OF HEALTH, et al.,

Defendants.

_____/

ORDER OF DISMISSAL

This matter is before the court on the magistrate judge's report and recommendation (document 83) and the objections thereto (document 84). I have reviewed de novo the issues raised by the objections. Upon consideration,

IT IS ORDERED:

The report and recommendation is ACCEPTED and adopted as the opinion of the court. Defendants' motion to dismiss plaintiff's third amended complaint (document 72) is GRANTED. The complaint is dismissed with prejudice for failure to state a claim upon which relief may be granted. The clerk shall enter judgment and close the file.

SO ORDERED this 21st day of February, 2008.

s/Robert L. Hinkle
Chief United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

BEVERLY BETANCUR,

Plaintiff,

vs. **Case No. 4:06cv428-RH/WCS**

STATE OF FLORIDA, DEPARTMENT OF HEALTH, et al.,

Defendants.

_____/

REPORT AND RECOMMENDATION

Defendants Cerio, Francois, Viamonte Ros, Meggs, and the State of Florida Department of Health filed a motion to dismiss the third amended complaint. Doc.72. Defendants raise five separate grounds for dismissal in their motion, which was filed on April 26, 2007. *Id.*, at 7. An order was entered advising the *pro se* Plaintiff to respond, doc. 79, even though at that time Plaintiff had already has submitted a response to the motion, doc. 74, and an amended response, doc. 75. Plaintiff was allowed to stand on her latest response, doc. 75, or submit a second amended response to the motion. On June 18, 2007, Plaintiff filed a second amended response, doc. 82. The motion to dismiss is ready for a ruling.

Allegations of the third amended complaint, doc. 58

Plaintiff holds a license from the Naturopathic National Council, Inc., and resides in the State of Connecticut. Doc. 58, p. 2. The Naturopathic National Council, Inc. [hereinafter "NNCI"], is "a national licensing agency organized and existing under the laws of the State of Connecticut . . . ." *Id.* The NNCI "is approved under IRS Code 501(c)(6) as a Medical Board and has its principal place of business in the City of Stamford, County of Fairfield, State of Connecticut." *Id.* Defendants are state officials, including the Florida Department of Health, the General Counsel for the Department of Health, the Secretary for the Department of Health, and the State Attorney for the Second Judicial Circuit, Leon County, Florida. *Id.*, at 1-2.

Plaintiff describes this case as one seeking a declaratory judgment to determine "whether or not the Supremacy Clause of the United States Constitution a federal trademark pre-empts an inconsistent state statute or regulation . . . ." Doc. 58, p. 3. Plaintiff seeks a declaration that FLA. STAT. chapter 462[1] is unconstitutional, and seeks to enjoin Defendants from enforcing this statute. *Id.*, at 3. In 2004, when Plaintiff was not able to obtain a license to practice naturopathy in the State of Florida, she founded the NNCI. *Id.*, at 6. The NNCI was to "regulate the standards for the Doctor of Naturopathy, N.D." and, as a courtesy, Plaintiff sent a letter to all 50 states

[1] The third amended complaint does not identify any particular statute that Plaintiff contends is unconstitutional. Rather, Plaintiff appears to be attacking all of chapter 462.

advising that the NNCI intended to "enter into such licensing activity." *Id.*

The NNCI was issued a Certificate of Registration No. 3,047,099, on January 17, 2006, from the U.S. Patent and Trademark Office. *Id.* Plaintiff alleges that the issuance of this certification by Patent and Trademark Office "authorizes licensure for the Doctor of Naturopathy, N.D." *Id.*

Plaintiff provided a copy of the registration as Exhibit A, attached to the third amended complaint. Doc. 58-2, p. 3. That document reveals a "certification mark" in the name of "Naturopathic National Council, Inc.," registered on January 17, 2006, and bearing "Reg. No. 3,047,099." *Id.* The next attachment to the complaint is a license issued to Plaintiff Beverly Betancur, from the Naturopathic National Council. Doc. 58-2, p. 5. The license states Plaintiff is "licensed nationally by this Council as a Doctor of Naturopathy, N.D." and the license is "Current through 04/15/07." *Id.* Plaintiff assigns a trademark symbol to the phrase "Doctor of Naturopathy, N.D.," apparently claiming her personal right to that trademark. *Id.*, p. 6.

On February 6, 2006, Plaintiff, as CEO of the NNCI, "issued a cease and desist order to the State of Florida advising that 'The Naturopathic National Council, Inc. owns the title Doctor of Naturopathy, N.D. and the derivative title Doctor of Naturopathic Medicine.' " *Id.*, at 7. Plaintiff stated that the "use of either title by individuals licensed by the state causes trade identity confusion; therefore, it is a violation of 15 USCA § 1125(a) of the Lanham Trademark Act." *Id.*

The Department of Health responded to Plaintiff's letter by advising Plaintiff that none of the arguments presented in that letter provided "a basis

for changing Chapter 462, Florida Statutes, the law that governs naturopathy in Florida." Exhibit D (Doc. 58, attachment, p. 10). Furthermore, as to the request to "cease and desist" giving the Doctor of Naturopathy title to those licensed in Florida, the letter advised that only seven persons hold a license to practice naturopathy in Florida and no state law prevents their use of the title. *Id.*

Plaintiff sent a letter in response to the Department of Health's letter stating that the NNCI "alone has the authority to issue naturopathic licenses in the State of Florida under the Dormant Commerce Clause, the Tenth Amendment to the United States Constitution and under federal trademark registration No. 3,047,099 . . . ." Ex. E (Doc. 58, p. 12). Plaintiff also stated that those seven persons "who are fraudulently licensed by the State of Florida as naturopaths cannot use the title Doctor of Naturopathy, N.D. or any of its derivatives without the authorization of the Naturopathic National Council, Inc." *Id.* Other letters were exchanged and, thereafter, Plaintiff reports "there still exist[s] a controversy between the parties" as to the NNCI's "legal right to license traditional naturopaths in the State of Florida." Doc. 58, p. 8.

Plaintiff asserts that "the State of Florida cannot hinder or obstruct the free use of a license granted by the Naturopathic National Council, Inc., a body authorized under its certification mark by the United States Patent and Trademark Office to issue Plaintiff's occupational license[,] because federal law preempts state law." *Id.*, at 10. Plaintiff further claims that "Defendants are in violation of 15 U.S.C.A. § 1125(a) because they have caused trade identity confusion by the unauthorized use of the trademarked title Doctor of naturopathy, N.D. or its

derivatives." *Id.*, at 11. Further, Plaintiff claims that Defendants have violated § 1125(a) "due to their practices of unfair competition . . . ."*Id.* Plaintiff also claims her rights under 42 U.S.C. § 1983 are violated because Defendants have discriminated against her by denying Plaintiff the right to obtain a license in Florida. *Id.*, at 12. Finally, Plaintiff alleges that Chapter 462 of the Florida Statutes violates the Thirteenth Amendment of the U.S. Constitution "in that it has the psychological effect of sending Plaintiff and traditional naturopaths in general into involuntary servitude by forcing them out of their profession under the threat of prosecution into other professions against their will . . . ." *Id.*, at 13. Plaintiff seeks declaratory, injunctive, and monetary damages as relief. *Id.*, at 13-16.

Defendants' arguments, doc. 72

Defendants contend that the complaint should be dismissed with prejudice because the Department of Health and the individual Defendants, who are sued in their official capacities, have Eleventh Amendment and sovereign immunity from suit. Doc. 72, p.7. Defendants sued in their individual capacities assert qualified immunity from suit. *Id.* Further, Defendants contend that the complaint fails to state a claim upon which relief may be granted. *Id.*

Due to the Eleventh Amendment and lack of a causal connection to actions by Francois and Cerio, the only two proper Defendants in this case are Rios and Meggs in their official capacities. The defense of qualified immunity is likewise probably correct with respect to all Defendants in their individual capacities. But the last argument is dispositive. Therefore, the court need not address the first two.

Standard of Review

Dismissal of a complaint, or a portion thereof, pursuant to Fed.R.Civ.P.12(b)(6) for failure to state a claim upon which relief can be granted should not be ordered unless it appears beyond doubt that Plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.CT. 99, 102, 2 L.Ed.2d 80 (1957). A court must accept the factual allegations of the complaint as true. Shotz v. American Airlines, Inc., 420 F.3d 1332, 1334-35 (11th Cir. 2005). "*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998).

Analysis

The claims against the individual Defendants are based on their actions in advising Plaintiff that Florida law no longer allows persons to be licensed to practice naturopathy in Florida and only those who were "grandfathered" long ago (seven persons at this point) may continue to practice naturopathic medicine. Further, Defendants refused to comply with Plaintiff's request for the state to "cease and desist" and recognize the Naturopathic National Council, Inc.'s "exclusive right" to the title Doctor of Naturopathy under the Lanham Trademark Act. Plaintiff's letter asserted that the Council owned "the title Doctor of Naturopathy, N.D. and its derivative title Doctor of Naturopathic Medicine" and the Defendants refused to recognize that claim of right.

At the outset it is observed that two prior challenges in this court to the constitutionality of various

provisions of Chapter 462 have been upheld. *See* Reinhardt v. Francois, 4:05cv107-WS/WCS (Jan. 31, 2006) (dismissing on *res judicata* grounds and noting that plaintiff previously lost a challenge to the grandfathering and saving clauses of the Naturopathy Practice Act in state case 03-CA-1271) and Freiberg v. Francois, 4:05cv177-RH/WCS (Aug. 15, 2006) (dismissing case and finding the complaint failed to state either a due process, First Amendment, or dormant commerce clause claim).

The State of Florida has a significant interest in the regulation of professions. *See* Douglas v. Nobel, 261 U.S. 165, 43 S.CT. 303, 67 L.Ed. 590 (1923) (noting that "a Legislature may, consistently with the federal Constitution, delegate" to a state board or agency the authority to grant, withhold, or revoke a license to practice a profession and may determine whether an applicant meets a standard of fitness); *see also* Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.CT. 2004, 44 L. Ed. 2d 572 (1975). The States have " 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.' " Medtronic, Inc. v. Lohr, 518 U.S. 470, 475, 116 S.CT. 2240, 135 L.Ed.2d 700 (1996) (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756, 105 S.CT. 2380, 85 L.Ed.2d 728 (1985)), *quoted in* Gonzales v. Oregon, 546 U.S. 243, 270, 126 S.CT. 904, 923 (2006).

> It is recognized without exception that the police power of a state extends to the right to regulate trades and callings concerning public health. Practitioners of the healing arts are properly subject to police regulation, the details of which are primarily with the Legislature and are not to be interfered with by the

federal court so long as fundamental constitutional rights are not violated.

Polhemus v. American Medical Ass'n, 145 F.2d 357, 359 (10th Cir. 1944).

Consequently, challenges to state laws precluding the practice of naturopathy or prescribing additional requirements before one may be licensed to practice of naturopathy have been universally upheld. Idaho Ass'n of Naturopathic Physicians, Inc. v. U.S. Food and Drug Administration, 582 F.2d 849 (4th Cir. 1978) (denying all claims including due process and equal protection claims concerning refusal to license practitioners of naturopathy and relying upon seven instances in which the Supreme Court "summarily affirmed or dismissed at least seven[2] cases challeng-

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[2] The cases cited were: Davis v. Beeler, 185 Tenn. 638, 207 S.W.2d 343 (1947) (holding that prohibiting naturopathy in Tennessee was a valid exercise of the State's police power and not discrimination), appeal dismissed for want of a substantial federal question, 333 U.S. 859, 68 S.CT. 745, 92 L.Ed. 1138 (1948); Taylor v. Oklahoma, 291 P.2d 1033 (1955) (upholding judgment which enjoined defendant from practicing naturopathy and using the title "Dr." or "physician"), appeal dismissed for want of a substantial federal question, 352 U.S. 805, 77 S.CT. 33, 1 L.Ed.2d 38 (1956); Dantzler v. Callison, 230 S.C. 75, 94 S.E.2d 177 (denied request by naturopaths for declaratory judgment and found no due process or equal protection violations in Act prohibiting practice of naturopathy), appeal dismissed for want of a substantial federal question, 352 U.S. 939, 77 S.CT. 263, 1 L.Ed.2d 235 (1956); State v. Errington, 355 S.W.2d 952 (holding that state law making practicing medicine without a license was not unconstitutional and finding no equal protection violation to deny a state license to one who practices naturopathy if he fails to meet certain statutory requirements), appeal dismissed for want of a substantial federal question, 371 U.S. 3, 83 S.CT. 27, 9 L.Ed.2d 48 (1962); Hitchcock v. Collenberg, 140 F.Supp. 894 (D. Md.1956) (upholding Maryland Medical Practice Act in challenge by naturopathic physician, association and residents which required certain requirements be-

ing state regulation of naturopathy"), *cert. denied* 440 U.S. 976 (1979); *see also* Polhemus v.American Medical Ass'n, 145 F.2d 357 (10th Cir. 1944) (finding no federal question presented in challenge to the "Grandfather Clause" of the Basic Science Law passed by the New Mexico Legislature which did not allow a naturopathic physician to practice without an examination). In the Idaho Ass'n. case, the Fourth Circuit Court of Appeals concluded that the argument that states must recognize naturopathy as a distinct form of medicine and that naturopathic practitioners are "entitled to licensing requirements different from those imposed on other physicians" has been "firmly, repeatedly, and authoritatively rejected." Idaho Ass'n of Naturopathic Physicians, Inc., 582 F.2d at 852-53. With this background in mind, the specific bases for Plaintiff's claims herein will be addressed.

Tenth Amendment

Plaintiff contends that the State of Florida has violated the Tenth Amendment because it has "relinquished the power to regulate the profession of naturopathy by licensure yet it has usurped the authority of the people by prohibiting the unregulated

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fore being licensed by the state), summarily affirmed, 353 U.S. 919, 77 S.CT. 679, 1 L.Ed.2d 718 (1957); Stuart v. Wilson, 211 F.Supp. 700 (N.D. Tex.1962) (upholding Texas Medical Practice Act's licensing requirements against challenge by naturopathic physicians), Aff'd, 371 U.S. 576, 83 S.CT. 547, 9 L.Ed.2d 537 (1963); and Beck v. McLeod, 240 F.Supp. 708 (D.S.C.1965), (upholding constitutional challenge to South Carolina statute establishing educational and examination requirements for one to practice naturopathy), *per curiam affirmed*, 382 U.S. 454, 86 S.CT. 645, 15 L.Ed.2d 522 (1966).

profession." Doc. 58, p. 9. Plaintiff complains that Chapter 462 requires a license, but does not offer a license to practice naturopathy. *Id.* Plaintiff contends that Sperry v. Florida, 373 U.S. 379 (1963) is authority to find that the State "cannot hinder or obstruct the free use of a license granted by the Naturopathic National Council, Inc. . . . to issue Plaintiff's occupational license because federal law preempts state law." *Id.*, at 10.

The relevant statute at issue, though not cited by Plaintiff, is § 462.023, which provides:

> The department may adopt such rules as are necessary to carry out the purposes of this chapter, initiate disciplinary action as provided by this chapter, and shall establish fees based on its estimates of the revenue required to administer this chapter but shall not exceed the fee amounts provided in this chapter. The department shall not adopt any rules which would cause any person who was not licensed in accordance with this chapter on July 1, 1959, and had not been a resident of the state for 2 years prior to such date, to become licensed.

FLA. STAT. § 462.023 (2007). Plaintiff's claim that Florida has "relinquished the power to regulate the profession of naturopathy" is legally false. Naturopathic physicians are not unregulated as FLA. STAT. § 462.11 provides:

> Doctors of naturopathy shall observe and be subject to all state, county, and municipal regulations in regard to the control of contagious and infectious diseases, the reporting of births and deaths, and to any and all other matters pertaining to the public health in the same manner as is required of other practitioners of the healing art.

FLA. STAT. § 462.11. Additionally, § 462.18 sets forth the educational requirements necessary for one to be licensed in the State of Florida and § 462.14 lists grounds for disciplinary action or the denial of a license. The profession is not unregulated.

Moreover, the Tenth Amendment to the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Thus, the Tenth Amendment reserves to the states the powers not delegated to the federal government by the Constitution. The states have the power to regulate the medical profession to protect the health and welfare of its citizens. *See*, e.g., Idaho Ass'n of Naturopathic Physicians, Inc., *supra*, and cases cited therein. Plaintiff's Tenth Amendment claim is without merit and the motion for summary judgment should be granted as to this claim.

Lanham Act, Trade Identity Confusion

Plaintiff also claims that Defendants are in violation of 15 U.S.C. § 1125(a) "because they have caused trade identity confusion by the unauthorized use of the trademarked title Doctor of Naturopathy, N.D. or its derivatives." Doc. 58, p. 11. Plaintiff also claims unfair competition, causing Plaintiff economic injury, and that Defendants are "egregiously misrepresenting to the public in the statute the nature of Plaintiff's services approved under" the trademark. *Id.*

There are three requirements for bringing a claim for infringement of a trademark. "[A] claimant must show (1) that it had prior rights to the mark at issue and (2) that the defendant had adopted a mark

or name that was the same, or confusingly similar to its mark, such that consumers were likely to confuse the two." Planetary Motion, Inc. v. Techsplosion, Inc., 261 F.3d 1188, 1193 (11th Cir. 2001), *citing* Lone Star Steakhouse & Saloon, Inc. v. Longhorn Steaks, Inc., 106 F.3d 355, 360 (11th Cir. 1997).

The claim is meritless on its face because there are no allegations that Defendants *use* either the name "Naturopathic National Council, Inc." or "Doctor of Naturopathy, N.D." **so as to cause confusion**. Further, Plaintiff is not the owner of the name "Naturopathic National Council, Inc." and appears to allege only that the mark "Doctor of Naturopathy, N.D." was conferred upon Plaintiff by the Council. Accordingly, Plaintiff has not alleged ownership of that mark either. These defects are fatal to this claim.

> The holder of a registered mark (incontestable or not) has a civil action against anyone employing an imitation of it in commerce when "such use is likely to cause confusion, or to cause mistake, or to deceive." § 1114(1)(a). Although an incontestable registration is "conclusive evidence. . .of the registrant's exclusive right to use the . . .mark in commerce," § 1115(b), the plaintiff's success is still subject to "proof of infringement as defined in section 1114," *ibid.* And that, as just noted, requires a showing that the defendant's actual practice is likely to produce confusion in the minds of consumers about the origin of the goods or services in question. *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 780, 112 S.CT. 2753, 120 L.Ed.2d 615 (1992) (STEVENS, J., concurring); *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 935 (C.A.4 1995);

RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 21, Comment a (1995).

KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111, 117, 125 S.CT. 542, 547-548, 160 L.Ed.2d 440 (2004). It is possible that one or more of the seven licensed naturopaths in this state are using the name "Doctor of Naturopathy, N.D." and, if that is the case, they have probably been doing so for a long time. If Plaintiff could show an exclusive *prior* right to use that name, Plaintiff's remedy is with those persons, not with Defendants. Defendants do not infringe a trademark by regulating the practice of naturopathy. This claim should be dismissed.

Due Process and Equal Protection of the Law

Plaintiff claims discrimination in violation of 42 U.S.C. § 1983 because the State allows an "elite group" of seven persons to have a license to practice naturopathy but denies "Plaintiff and all other qualified persons the right to obtain a license . . . ." Doc. 58, p. 12. Plaintiff also asserts claims for due process violations and the infringement of the right to contract. *Id.*

Plaintiff's claims have been routinely denied by courts. *See* Idaho Ass'n of Naturopathic Physicians, *supra*, and cases cited therein. It has been long established that states may require that certain educational conditions be met before allowing one to practice a form of medicine as part of the state's right and authority to regulate for the welfare and safety of the public. Louisiana State Board of Medical Examiners v. Fife, 162 La. 681, 111 So. 58, 54 A.L.R. 594, *aff'd* 274 U.S. 720 (1927); Hitchcock v. Collen-

berg, D.C., 140 F.Supp. 894, *aff'd* 353 U.S. 919 (1957); Schlicting v. Texas State Board of Medical Examiners, Tex., 310 S.W.2d 557 (Tex. 1958); State v. Errington, 355 S.W.2d 952, 957 (Mo. 1962). Such qualifications may be established without offending the Equal Protection Clause so long as there is a "reasonable basis" for doing so. Woods v. Holy Cross Hospital, 591 F.2d 1164, 1174 (5th Cir. 1979); *see also* Freiberg v. Francois, 2006 WL 2362046 (N.D. Fla. 2006).

The fact that a "grandfather clause" exists under Florida law, permitting seven persons to retain their license to practice naturopathy, is not arbitrary or unreasonable and does not violate Plaintiff's equal protection rights. Polhemus v. American Medical Ass'n 145 F.2d 357, 359 (10th Cir. 1944) (upholding the state of New Mexico's "Basic Science Law" against challenge from naturopathic physician). The motion to dismiss should be granted as to Plaintiff's equal protection claims.

Plaintiff's due process claim also must fail. Plaintiff alleges a denial of "economic substantive due process," doc. 58, p. 12, and asserts that "[o]utlawing naturopathy abridged Plaintiff's right to Economic Substantive Due Process." Doc. 82, p. 9.

Plaintiff does not have a valid due process claim. The statute at issue does not "outlaw" naturopathic medicine. Plaintiff and other persons wishing to provide naturopathic treatment may do so as long as they meet Florida's educational qualifications and obtain the "added knowledge of health care that comes with an allopathic or osteopathic degree." Freiberg v. Francois, 2006 WL 2362046, at *9 (N.D. Fla. 2006). This is similar to the decision reached in Hitchcock v. Collenberg, 140 F.Supp. 894, 899 (D.C. Md. 1956):

> The Maryland law does not prohibit the practice of naturopathy. Any person who has met the qualifications necessary to secure a license to practice medicine, i.e. to engage in the art or science of healing, may apply the principles of naturopathy in his practice. Maryland has simply established certain requirements which must be met by any person who undertakes to practice medicine, as that term is defined . . . .

Hitchcock, 140 F.Supp. at 899. In light of the number of cases which have held that no due process rights are violated in statutes which preclude the practice of naturopathic medicine, Plaintiff's due process claim must fail. *See* Idaho Ass'n of Naturopathic Physicians, Inc., 582 F.2d 849 (4th Cir. 1978); Rastetter v. Weinberger, 379 F.Supp.170 (D. Ariz. 1974), *aff'd* 419 U.S. 1098 (1975); Blass v. Weigel, 85 F.Supp. 775 (D.C. N.J. 1949).

Finally, Plaintiff's claim based on her "freedom to contract" is insufficient. The complaint fails to allege that Plaintiff sought a lawful contractual relationship which was impaired. Plaintiff's claim is simply another attack on the validity of state law prohibiting further licensing of naturopath physicians.

Dormant Commerce Clause

Plaintiff claims Defendants have violated the Dormant Commerce Clause[3] by "prohibiting the na-

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[3]The Commerce Clause both grants powers to Congress and "also limits the power of the States to erect barriers against interstate trade." Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980). This "negative command" is "known as the dormant Commerce Clause." American Trucking Associations, Inc. v. Michigan Public Service

turopathic National Council, Inc. from engaging in interstate commerce to license naturopaths and by prohibiting Plaintiff from engaging in interstate commerce with her license . . . ." Doc. 58, p. 13. Such a claim was previously resolved in Freiberg v. Francois, *supra*.

"In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." Lewis v. BT Inv. Managers, Inc., 447 U.S. at 35, 100 S.CT. at 2015.

> [T]he first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." As we use the term here, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually per se invalid. By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or., 511 U.S. 93, 99, 114 S.CT. 1345, 1350, 128 L.Ed.2d 13 (1994) (cita-

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Com'n, 545 U.S. 429, 125 S.Ct. 2419, 2422, 162 L.Ed.2d 407 (2005).

tions omitted). It is unnecessary to set forth all of the analysis from Freiberg, but it is worth noting that Florida's refusal to license naturopaths does not have the purpose of unfairly protecting Florida licensed naturopaths from competition, especially as judged at this point in the history of the statutes, when there are only seven licensed naturopaths remaining. The remaining licensed naturopaths have been in practice for nearly 50 years, and probably more, so the "protectionism" that results from Florida's regulatory choice is of little significance to interstate commerce. Further, that there are still some licensed naturopaths in Florida is only the result of the apparent constitutional necessity to grandfather those who were licensed long ago, when the abolition of licensing took place.

Additionally, the lack of licensing in Florida applies equally to non-residents and to Florida residents like Plaintiff, who are trained in naturopathy, and only forbids the practice of naturopathy in Florida for those lacking a Florida license. Thus, the statutes only apply to intrastate transactions and thus probably does not violate the dormant Commerce Clause at all for that reason. American Trucking Associations, Inc. v. Michigan Public Service Com'n, *supra*, note 3, 125 S.CT. at 2423 (finding no dormant Commerce Clause violation for a flat $100 fee applying only to intrastate transactions, applying "even-handledly to all carriers making domestic journeys," and not reflecting an effort to tax activity taking place outside the state).

Florida has a significant interest in determining who to license as eligible to provide health care in the state, and what conditions to attach to such licenses, since these regulatory activities directly affect the health and safety of Florida citizens. One

trained in naturopathy may still practice that discipline in states that license naturopathic practice, although such a person cannot practice in Florida absent a medical degree and license. This creates a burden on commerce because it limits the places where a naturopath, licensed as such, may practice. But the burden on commerce is slight and is not excessive in comparison to the legitimate state interest. Because the complaint fails to state a claim upon which relief may be granted under the dormant Commerce Clause, Defendants' motion to dismiss should be granted.

Thirteenth Amendment

Plaintiff claims that Chapter 462 violates the Thirteenth Amendment "in that it has the psychological effect of sending Plaintiff and traditional naturopaths in general into involuntary servitude by forcing them out of their profession . . . ." Doc. 58, p. 13. Defendants have argued that Plaintiff has the "option to work elsewhere, or in other professions" and Florida has not subjected Plaintiff into involuntary servitude. Doc. 72, p. 20.

The Thirteenth Amendment is aimed at *involuntary* servitude:

> The Thirteenth Amendment to the Federal Constitution, made in 1865, declares that involuntary servitude shall not exist within the United States and gives Congress power to enforce the article by appropriate legislation.
>
> Congress on March 2, 1867, enacted that all laws or usages of any state 'by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of

any persons as peons, in liquidation of any debt or obligation, or otherwise,' are null and void, and denounced it as a crime to hold, arrest, or return a person to the condition of peonage. Congress thus raised both a shield and a sword against forced labor because of debt.

Pollock v. Williams, 322 U.S. 4, 7-8, 64 S.CT. 792, 794-795, 88 L.Ed. 1095 (1944). In the Pollock case, the Court explained:

The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. Forced labor in some special circumstances may be consistent with the general basic system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways which society may compel. But in general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition. Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service. This congres-

sional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor. The federal statutory test is a practical inquiry into the utilization of an act as well as its mere form and terms.

Pollock, 322 U.S. at 17-18, 64 S.CT. at 799.

Plaintiff does not allege that she has been made to work against her will. She claims instead that Defendants have precluded her "voluntary servitude," that is, her choice of work. The Thirteenth Amendment is not implicated by her allegations at all.

Conclusion

Accordingly, it is **RECOMMENDED** that Defendants' motion to dismiss, doc. 72, Plaintiff's third amended complaint, doc. 58, be **GRANTED** and the complaint **DISMISSED with prejudice** for failure to state a claim upon which relief may be granted.

IN CHAMBERS at Tallahassee, Florida, on February 4, 2008.

s/ William C. Sherrill, Jr.
WILLIAM C. SHERRILL, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

A party may file specific, written objections to the proposed findings and recommendations within 15 days after being served with a copy of this report and recommendation. A party may respond to another party's objections within 10 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.

APPENDIX D

Licensees of the Naturopathic National Council, Inc.

1	Ahmed, S.	New York
2	Baez, J.	New York
3	Betancur, B.	Connecticut
4	Bielinski, S.	Wisconsin
5	Borden, B.	Wisconsin
6	Brickell, J.	Colorado
7	Brown, E.	Washington, D.C.
8	Bruno, A.	New Jersey
9	Cañas, J.	Florida
10	Castillo, G.	New York
11	Cohen, D.	New York
12	Cruz, J.	Connecticut
13	Davis, E.	Kentucky
14	D'Elene, K.	Washington
15	Dodos, I.	New York
16	Drouin, P.	Hawaii
17	Ducon, M.	Pennsylvania
18	Duque, J.	New York
19	Echavarria, N.	New York
20	Escobar, G.	New Jersey
21	Ezhuthachan, S.	Michigan
22	Frye, B.	Oklahoma
23	Geigle Jr., J.	Pennsylvania
24	Grimaldos, J.	New Jersey
25	Hart, M.	Illinois
26	Hernandez, C.	Indiana
27	Hernandez, R.	Puerto Rico
28	Holloway, C.	Ohio
29	Hoyos, R.	New York

30	Jackson, O.	Michigan
31	Jardel, B.	New York
32	Jardel, E.	New York
33	Jimenez, M.	New York
34	Jimenez, P.	New York
35	Jones, K.	Illinois
36	Konior, W.	New York
37	Levine, D.	Texas
38	Porter, M.	New York
39	Lozano, A.	New York
40	MacGregor, Jr., L.	Indiana
41	Malave, M.	Rhode Island
42	Martinez, A.	New Jersey
43	Martinez, C.	New York
44	Martinez, R.	New Jersey
45	Mestanza, H.	New York
46	Mitsis, Y.	New York
47	Montejo, H.	Florida
48	Moreta, F.	New York
49	Navas, L.	New Jersey
50	Oler, C.	Wisconsin
51	Olguin, F.	Texas
52	Olivo, F.	New York
53	Perez, A.	New York
54	Recio, J.	New York
55	Rodriguez, M.	New York
56	Shields, M.	Kentucky
57	Siczkowycz, J.	Wisconsin
58	Trilivas, G.	New York
59	Trubey, R.	Arizona
60	Usual, A.	Maryland
61	Valdez, L.	New York

62	Valdez, O.	New York
63	Vega, T.	New York
64	Verghese, S.	New Jersey
65	Villota, V.	New York
66	Wass, L.	New Jersey
67	Wells, M.	Texas
68	Williams, D.	Maryland
69	Williams, K.	Indiana
70	Zahoor, M.	Michigan